Ngowa v Republic (Petition E001 of 2024)
[2025] KEHC 728 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEHC 728 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

PETITION E001 OF 2024

M THANDE, J

JANUARY 31, 2025

BETWEEN

TYSON GEORGE NGOWA ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Petitioner was convicted of the offence of attempted defilement contrary to Section 9(1) as read with subsection (2) of the *Sexual Offences Act* in Malindi Sexual Offences Case No. 19 of 2014 and sentenced to 20 years imprisonment. Aggrieved by the decision, he appealed against both the conviction and sentence in Malindi High Court Criminal Appeal No. 40 of 2015, which appeal was dismissed on 29.8.16. Unrelenting, the Petitioner filed Criminal Appeal No. 16 of 2017 in the Court of Appeal at Malindi which was dismissed by a judgment dated 7.12.17.

2. The Petitioner has now come back to this Court vide his Petition filed on 23.1.24 which he says he has brought under Article 50(2)(q) of the *Constitution*. He further states that he is not challenging his "innocence or guilt" as he has exhausted all avenues of appeal. He has served 10 years of his sentence and seeks that the period of 8 months he spent in custody be taken into account pending trial pursuant to Sentence 333(20 of the criminal procedure Code. He further asserts that he has reformed and requests to be reintegrated to society. He is the sole breadwinner and his family has suffered due to his incarceration. He added that the sentence of 20 years imposed upon him does not conform to international standards as required under Article 2(5) and (6) of the *Constitution* and the objectives of sentencing in the Sentencing Guidelines, 2016.

    1. The Petition is opposed by the vide grounds of opposition dated 24.4.24. The grounds are that the Petitioner admits that he has exhausted all avenues of appeal; that the sentence imposed was determined by the trial court as a matter of fact which took into account the Petitioner's mitigation and the fact that he was a first offender; that Kenyan law does not provide for

parole and it matters not that the Petitioner is now of good behaviour; that this Court lacks jurisdiction to review the sentence through the present Petition; that the Petition ought to be dismissed as it is bad in law, an abuse of the court process and devoid of merit.

4. At the very outset, this Court must determine whether it has jurisdiction to entertain the Petition before it. The law, is that a court may only exercise that jurisdiction which has been conferred upon it by the *Constitution*, statute or both. This was succinctly stated by the Supreme Court in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, as follows:

> A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

5. This Court derives its jurisdiction principally from Article 165(3) of the *Constitution* which confers upon it, unlimited original jurisdiction in criminal and civil matters. The provision clearly delineates and demarcates what the Court can and cannot do. The jurisdiction of this Court includes supervisory powers. By dint of Article 165(6) however, this Court cannot supervise superior courts. It provides:

> The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

6. The superior courts in the court system in Kenya are listed in Article 162 (1) of the *Constitution* as follows:

> The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

7. It is common ground that upon conviction by the trial court, the Petitioner unsuccessfully appealed to this Court and the Court of Appeal which upheld both the conviction and sentence. What he now seeks is that this Court reviews its own decision and that of the Court of Appeal, a jurisdiction it does not have. In this regard, I associate with the holding in John Kagunda Kariuki v Republic [2019] eKLR, where Ngugi, J, (as he then was) stated:

> 10. In the present case, the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal.

8. At the helm of the Court system in Kenya is the Supreme Court followed by the Court of Appeal. This Court falls below the Court of Appeal. The decision of the Court of Appeal dismissing the Petitioner's appeal is binding on this Court. By his Petition, the Petitioner seeks that this Court re-opens and re-hears a concluded appeal and reviews the judgment of the Court of Appeal, a court superior to it. To entertain this matter in respect of which the Court of Appeal has pronounced itself therefore, no matter how compelling the arguments placed before it, would be to violate the constitutional judicial hierarchical norm.

9. In the case of Kenya Hotel Properties Limited v Attorney General & 5 others [2020] eKLR, the Court of Appeal addressed the judicial hierarchical orders and stated:

> As we stated at the beginning of this judgment this appeal is disturbing. The multiplicity of endless proceedings around the same dispute does not bode well for the administration of justice...Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the Court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. the *Constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts.
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> Moreover, under Article 164(3) of the *Constitution*, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong; without jurisdiction it would be embarking on a hopeless adventure to nowhere.

10. This finding of the Court of Appeal was affirmed by the Supreme Court in Kenya Hotel Properties Limited *v Attorney General & 5 others (Petition 16 of 2020*) [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment), which stated:

> 55. We need to emphasize and reiterate that Mutunga CJ did not in any way state that the High Court may in any way, purport to overturn or order final decisions issued by higher courts than itself to start de novo, especially on appeals that have been finally concluded by the highest court at the time. Furthermore, the concurrence by Mutunga SCJ cannot override the judgment by the majority, despite what the appellant chooses to submit. As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves.

11. I am duly guided by the cited decisions. The Petitioner's appeal was heard and determined by this Court and the Court of Appeal, a fact that he admits. Without jurisdiction to supervise a superior court, this Court cannot reopen or review the decisions of its peers of equal and competent jurisdiction, much less those of a court higher than itself. The Appellant cannot therefore invite this Court to tread on forbidden ground by reopening the matter to rehear the same. This would defy the constitutional hierarchy of the courts.

12. In light of the foregoing, the Court finds that the Petition herein is incompetent for want of jurisdiction and the same is hereby struck out.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 31ST DAY OF JANUARY 2025

M. THANDE

JUDGE